

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re NOEL PHILLIPE SCOTT,

on Habeas Corpus.

B165619

(Los Angeles County
Super. Ct. No. HC 3756(6))

PETITION for writ of habeas corpus. Writ granted.

Noel Phillippe Scott, in pro. per.; Donald Specter and Anne Mania, under appointments by the Court of Appeal, for Petitioner.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Frances T. Grunder, Senior Assistant Attorney General, Julie L. Garland and Heather Bushman, Deputy Attorneys General, for Respondent.

In his petition for a writ of habeas corpus, Noel Phillippe Scott challenges the imposition by the Director of Corrections for the California Department of Corrections (Director) of 90-day conduct credit loss for engaging in mutual combat where “the aggressor cannot be determined” under section 3323, subdivision (f)(9) (§ 3323(f)(9)) of title 15 of the California Code of Regulations (CCR)¹.

The pivotal issues are: (1) whether Scott’s delay in seeking relief bars his claims; and, (2) if not, whether there is “some evidence” to sustain the implied finding that “the aggressor cannot be determined” as that phrase is employed in section 3323(f)(9).

As we shall demonstrate, based on the record and applicable law and regulations, we conclude the delay in seeking relief does not bar Scott’s claims and there was no evidence to support the implied finding that “the aggressor cannot be determined[.]” We therefore issue a writ directing the Director to annul the challenged discipline of 90-day conduct credit loss and to adjust Scott’s credits accordingly.

PROCEDURAL AND FACTUAL SUMMARY

On April 16, 2001, Scott was charged with battery upon an inmate, Luis Martinez, who was his cellmate. According to the CDC Form 115 Rules Violation Report (RVR), a correctional officer was notified that Scott was at the East Clinic without a pass and that he had “injuries consistent with being in a fight.” Upon locating Martinez in his cell, the officer noticed “scratches around

¹ All further section references are to title 15 of the California Code of Regulations.

his face and hands.” During an interview, Martinez “admitted, ‘I got in a fight with my cellie! I told him to get a move to another cell, but he didn’t care. I just snapped.’”

The medical report dated April 16, 2001, for Martinez reflects he sustained scrapes, multiple scratches, and a contusion below his left knee. The medical report on the same date for Scott reflects he had a split lip and exhibited bruising and abrasions.

On April 17, 2001, during an interview, Scott “admitted his involvement in the fight . . . and gave a similar account of . . . events.”

On April 21, 2001, the CDC hearing officer determined the evidence did not reflect a battery and, instead, found Scott guilty of violating section 3005, subdivision (c) [mutual combat], a lesser charge. Scott was then assessed a 90-day loss of conduct credit for a “Division ‘D’ offense.”

On January 11, 2002, as reflected in the Director’s Level Appeal Decision (DLA Decision), the Inmate Appeals Branch (IAB) rejected Scott’s administrative appeal of the hearing officer’s findings and disposition. In so doing, the IAB stated Scott “was discovered with injuries consistent with being in mutual combat. The evidence reveals that inmate Martinez probably initiated the incident. However, based upon the injuries sustained by both inmates, it is reasonable to conclude that at some point during the altercation both inmates engaged in combat. [Scott’s] claim that he was merely a victim is rejected.”

On December 9, 2002, the superior court denied Scott’s habeas petition on the grounds he had failed to “allege facts establishing good cause for his delay in seeing relief from the hearing officer’s decision, or that his claims fall within an exception to the timeliness bar.”

On December 13, 2002, the superior court denied his petition for rehearing.

On March 17, 2003, Scott filed the present petition in pro se.²

On March 27, 2003, we requested a preliminary response from the Director.

On April 18, 2003, the Director filed his preliminary response. He argued that the petition should be dismissed as untimely and, on the merits, that the petition should be denied, because the aggressor could not be “positively determined” since although Scott’s cellmate “‘probably initiated the incident,’ the injuries sustained by the cellmate led officials to conclude that [Scott also] engaged in combat.”

On May 19, 2003, Scott filed a reply to the preliminary response and made the following pertinent arguments. He pointed out that the Director failed to show how the delay had impaired his ability to address the merits of the petition and argued that “the delay caused no hardships whatsoever.” Scott further argued that the delay, which resulted from “lockdowns, no access to habeas forms, and [the fact his] legal property was missing[,]” was justified. He also pointed out that the Director failed to “dispute that the prison was continuously on lockdown or [to offer] any argument concerning [his] lost property after the CDC appeal was denied.”

On the charge of mutual combat, Scott challenged as false the Director’s claim that he “was admittedly involved in a physical altercation with his cellmate” and denied that he ever “admitted to striking [his] celly or that [he]

² Pursuant to this court’s order filed June 12, 2003, counsel was appointed to represent Scott.

was in a fight with him.” Although he conceded that he “later admitted involvement and gave a similar account of the events,” Scott urged that this did not signify that he “admitted to being an equal participant in a fight.”³

Scott argued that Martinez’s statement set forth in the RVR constitutes a clear admission on the latter’s part that he was the aggressor and that the statement “Martinez probably initiated the incident” in the DLA Decision means the IAB apparently agreed. He also points out that, contrary to the Director’s claim, the record does not “show [Scott] physically participated in the altercation by striking his cellmate.”

On June 12, 2003, we ordered the Director to show cause why an order should not issue directing it either to annul the above discipline based on a “Division ‘D’” offense under section 3323(f)(9) [“Mutual combat with no serious injury where the aggressor cannot be determined”] or, alternatively, to reduce such discipline to that applicable to a “Division ‘F’” offense under section 3323, subdivision (h)(3) [“Any other serious rule violation listed in section 3315 and not a crime”] and to adjust his prison credits accordingly.

On August 11, 2003, the Director filed his return.⁴ He argued that Scott’s delay was not excused, because Scott was not improperly denied staff assistance or the opportunity to call witnesses. He further argued that the evidence

³ We note that the version of the incident by Scott set forth in his reply was not contained in the evidence before the hearing officer or the IAB, and thus, is not properly before us.

⁴ The return was filed by the Attorney General on behalf of Anthony Lamarque, Warden of the Salinas Valley State Prison. We deem the return to have been filed on behalf of the Director, the proper respondent. (See *People v. Cooke* (2003) 11 Cal.App.4th 557.) The Director elected not to reduce the discipline and, instead, argued the petition should be “denied in its entirety.”

presented at the hearing sufficiently supported the charge of mutual combat in that “the injuries sustained by [Scott’s] cellmate [signifies that Scott] became [the] aggressor in the combat once it had been initiated”

DISCUSSION

1. No Undue Delay in Seeking Relief Shown

The Director takes the position that Scott’s habeas petition is untimely, because Scott failed to provide an adequate explanation for his delay in seeking review. We find the Director’s position to be unsupported by the record.

Scott filed his original habeas petition on August 19, 2002. The superior court summarily denied it on September 6, 2002, on the grounds that it was not on the approved form; he had failed to exhaust administrative remedies, i.e., “no proof that Director’s level review was sought”; and “[u]nexplained delay” in that the challenged disciplinary action was “complete in February 2001, that’s one and one-half years ago.”

His second habeas petition, which was filed on November 26, 2002, challenged the April 21, 2001, finding of mutual combat by the disciplinary hearing officer. The December 9, 2002, order by the superior court denying this petition reflected the following court findings: (1) “He exhausted his administrative remedies on January 11, 2002”; (2) He did “not allege facts establishing good cause for his delay in seeking relief from the hearing officer’s decision, or that his claims fall within an exception to the timeliness bar”; and (3) His conclusionary statements that “he was transferred and subject to a prison lockdown” did not “satisfy his burden to show that his delay was justified.”

The Director argues that Scott failed to establish through specific facts, e.g., dates, documents, or declaration, that the delay in filing of his administrative appeal and habeas petitions was justified, because they were attributable to prison “transfers, prison lockdowns and limited access to the law library.”

We find the absence of a declaration and supporting documents and the omission of specific dates and timeframes to be inconsequential. It is sufficient that Scott set forth his reasons for his delay in his petition, which he verified, specifically stating that “the foregoing allegations and statements [in the petition] are true and correct[.]” (See *In re Clark* (1993) 5 Cal.4th 750, 765, fn. 5.)

In item 11 of the form petition, Scott explained that “[t]his appeal was filed as soon as possible due to several transfers and the unavailability of [his] legal property and paperwork. And due to this prisons [*sic*] constant lockdown status the appeal was delayed as [he] was denied access to the prison law library.” In item 13, he stated there was “[n]o substantial delay. [He] has [been] transfered [*sic*] several times since issuance of disciplinary and lost his property for quite a while.”

With respect to the foregoing reasons, the Director only addresses the issue of the transfers with a factual showing. He urges Scott cannot claim the transfers were an adequate reason for the delay since his “chronological history indicates that he was transferred to Centinela State Prison shortly after the April 21, 2001 hearing, and then again to Salinas Valley State Prison approximately two months later. [He] has not been transferred since July 2001 however, and . . . this transfer occurred six months before his administrative appeal was complete[.]”

The Director’s failure to set forth a factual showing to counter Scott’s reasons for delay arising from the unavailability of his property due to such transfers, the constant prison lockdowns, and denial of access to the prison law library amounts to a concession that such reasons are valid and adequate. Moreover, the Director has failed to claim and substantiate any prejudice accruing from any delay in Scott’s seeking administrative or judicial review. Accordingly, we conclude Scott’s claims are not barred as untimely.

2. *Finding That “The Aggressor Cannot Be Determined”
Unsupported by Evidence*

The Director, alternatively, takes the position that the petition must be denied on the merits, because there was “some evidence” to support the implied finding that “the aggressor cannot be determined.” We conclude such finding was unsupported by *any* evidence.

A “Division ‘D’ offense” carries a penalty of loss of credit from 61 to 90 days. “Mutual combat with no serious injury where the aggressor cannot be determined” qualifies as such an offense. (§ 3323, subd. (f)(9).)

The definition of “aggressor” is not provided in section 3323 or elsewhere in the CCR. We therefore apply the dictionary definition therefor.⁵ (See, e.g., *People v. Castro* (1985) 38 Cal.3d 301, 334, fn. 4; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52.)

⁵ We do not address the issue of the identity of the “aggressor” in the context of self-defense, which involves a factual situation not before us. (See *People v. Jackson* (1959) 53 Cal.2d 89, 94; *People v. Hernandez* (August 23, 2003, No. E031875) ___ Cal.App.4th ___, ___ [3 Cal.Rptr. 586, 590-592]; see also, CALJIC Nos. 5.54, 5.56 (6th ed. 1996).)

An aggressor is someone “who sets upon, attacks, or assails another; he who makes the first attack, or takes the first step in provoking a quarrel.” (Oxford English Dict. Online (2003) <http://dictionary.oed.com/cgi/entry/0000>.)

The burden of proof resides with the Department of Corrections to sustain by “a preponderance of the evidence” at the hearing “[a]ny finding of guilt[.]” (§ 3320, subd. (1).)

Judicial review of a prison administrative discipline decision is subject to the “some evidence” standard set forth in *Superintendent v. Hill* (1985) 472 U.S. 445, 455-456. (See also *In re Rosenkrantz* (2002) 29 Cal.4th 616, 656; *In re Powell* (1988) 45 Cal.3d 894, 904.) Such standard is not a high hurdle but necessarily involves a quantum of evidence beyond no evidence. “[T]he relevant question is whether there is *any* evidence in the record that could support the conclusion reached by the disciplinary board.” (*Superintendent v. Hill, supra*, 472 U.S. at pp. 455-456, italics added.)

Mindful of these principles, we conclude that the record discloses the absence of *any* evidence to support a finding that “the aggressor cannot be determined.” Rather, the evidence presented points directly and unequivocally to Scott’s cellmate, Martinez, as the aggressor. Martinez told the investigating guard that he “just snapped” during a conversation with Scott in their cell. Although the hearing officer’s decision did not contain a finding that “the aggressor cannot be determined[.]” the DLA Decision sets forth the conclusion that “[t]he evidence reveals that inmate Martinez *probably* initiated the incident.” (Italics added.)

The Director contends that there is sufficient evidence to support a finding that “the aggressor cannot be determined” based on the evidence that Scott also participated in the fight, and thus, he, too, was an aggressor.

The record reflects Scott admitted he was involved in a fight with Martinez “and gave a similar account of the events[.]” Martinez had scrapes, scratches, and a contusion below a knee while Scott sustained bruising, abrasions, and a split lip. The hearing officer found that Scott and Martinez both admitted participating in a fight and rejected Scott’s “attempt[] to [portray] himself as [the] victim.” The DLA Decision stated that “based upon the injuries sustained by both inmates, it is reasonable to conclude that at some point during the altercation both inmates engaged in combat.”⁶

We find the Director’s premise to be unpersuasive. Taking such premise to its logical conclusion, if both Martinez and Scott were aggressors, then a finding that “the aggressor cannot be determined” is still unsupportable. In that situation, the aggressor can be determined, because both are aggressors. Such construction of “aggressor” would render that term unintelligible in the context of the above phrase, and thus, it necessarily must be rejected.

In view of the foregoing, we conclude the decision that Scott is guilty of mutual combat cannot be sustained and for that reason the resulting discipline cannot stand. We further conclude, however, that this disposition does not preclude the Director from pursuing other courses of action under any applicable authorized regulations.

⁶ We note that the record does not support the assertions in the Director’s preliminary response that Scott “was discovered fighting with his cell mate” and that “the records show that [Scott] physically participated in the altercation by striking his cellmate.” The record simply reflects a prison officer observed scratches on the area around Martinez’s face and hands; the respective medical reports state Martinez sustained scrapes, multiple scratches, and a contusion below a knee while Scott had a split lip, bruises, and abrasions; and both Martinez and Scott admitted fighting.

DISPOSITION

The petition is granted. The Director is directed to annul the challenged discipline of 90-day conduct credit loss and to adjust Scott's credits accordingly.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURRY, J.

We concur:

EPSTEIN, Acting P.J.

HASTINGS, J.